

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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2850 GRAND ISLAND BOULEVARD  
OPERATING COMPANY, LLC, d/b/a  
ELDERWOOD AT GRAND ISLAND

**PETITION FOR REVIEW**

Petitioner,

Case No.

vs.

NATIONAL LABOR RELATIONS BOARD

Respondent.

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Pursuant to Section 10(f) of the National Labor Relations Act (“NLRA” or “Act”), 29 U.S.C. §160(f) and Rule 15 of the Federal Rules of Appellate Procedure, 2850 Grand Island Boulevard Operating Company, LLC, d/b/a Elderwood at Grand Island (“Elderwood”) petitions the court to review and set aside the Decision and Order of the National Labor Relations Board in Case No. 03-CA-193859, reported at 365 NLRB No. 110, dated July 21, 2017. A copy of the Decision and Order is attached as **Exhibit A**. Elderwood’s Corporate Disclosure Statement is attached as **Exhibit B**.

This Court has jurisdiction in this matter pursuant to Section 10(f) of the Act because the NLRB’s Decision and Order is a final order. 29 U.S.C. § 160(f). Elderwood is a party aggrieved by said Decision and Order. Venue in this Court is proper pursuant to 29 U.S.C. § 160(f).

WHEREFORE, Elderwood prays that its Petition for Review of the Board's Decision and Order be granted; that upon such review the Board's Decision and Order be set aside and denied enforcement; and that Elderwood be granted such other and further relief as the Court deems appropriate.

DATED: July 31, 2017

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## CERTIFICATE OF SERVICE

It is hereby certified that the forgoing Petition for Review was served via email and regular mail on July 31, 2017 to the Respondent National Labor Relations Board:

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and on the following counsel of record for 1199 SEIU United Healthcare Workers East, the only party beside Petitioner that was admitted to participate in the agency proceedings:

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# EXHIBIT A

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**2850 Grand Island Boulevard Operating Company, LLC d/b/a Elderwood at Grand Island and 1199 SEIU United Healthcare Workers East. Case 03-CA-193859**

July 21, 2017

**DECISION AND ORDER**

BY CHAIRMAN MISCIMARRA AND MEMBERS  
PEARCE AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on February 28, 2017, by 1199 SEIU United Healthcare Workers East (the Union), the General Counsel issued the complaint on May 1, 2017, alleging that 2850 Grand Island Boulevard Operating Company, LLC d/b/a Elderwood at Grand Island (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 03-RC-184298. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and amended answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On May 18, 2017, the General Counsel filed a Motion for Summary Judgment. On May 19, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

**Ruling on Motion for Summary Judgment**

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the certified unit includes supervisory employees outside the coverage of the Act, and that the alleged supervisory employees, the Union, and its supporters created an atmosphere of fear and reprisal by engaging in inappropriate conduct.<sup>1</sup>

<sup>1</sup> In addition, the Respondent argues for the first time in its response to the Notice to Show Cause that the challenged ballots were prematurely opened and counted on January 13, 2017, before the Respondent's time to file its Request for Review had expired and, thus, before the issue of supervisory status was fully resolved. The Respondent could have, but did not, raise this issue before the Board in the underlying

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent has been a corporation with an office and place of business in Grand Island, New York, where it has been engaged in the operation of a nursing home.

Annually, in conducting its business operations described above, the Respondent derived gross revenues in excess of \$100,000 and purchased and received at its Grand Island, New York facility goods valued in excess of \$5000 directly from points located outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a healthcare institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. The Certification**

Following the representation election held on October 6, 2016, the Union was certified on February 2, 2017,<sup>3</sup> as

ing representation proceeding. Therefore, we find that the Respondent's assertion does not raise any genuine issue of material fact warranting a hearing.

<sup>2</sup> The Respondent's request that the complaint be dismissed is therefore denied.

Chairman Miscimarra agreed with the denial of review in the underlying representation proceeding but noted that he disagreed with and disclaimed reliance on certain statements in the Acting Regional Director's Supplemental Decision and Order on Challenged Ballots and Objections, with respect to disregarding certain un rebutted evidence. While he remains of that view, Chairman Miscimarra agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

<sup>3</sup> By unpublished Order dated April 21, 2017, the Board denied the Respondent's request for review of the Acting Regional Director's



the exclusive collective-bargaining representative of the employees in the following appropriate unit:

**INCLUDED:** All full-time and regular part-time and per diem service and maintenance and technical employees including LPNs, LPN Team Leaders, LPN Charge, CNAs, Activity Leaders, Cooks, Dietary Aides, Housekeeping Aides, Laundry Aides, Maintenance Assistants, Memory Care Specialists, Physical Therapy Aides, Seasons Certified Nursing Assistants, Certified Occupational Therapy Assistants, Diet Technicians, Physical Therapy Assistants, Unit Clerks, Receptionists, and Medical Records Coordinators employed by the Employer at its 2850 Grand Island Boulevard, Grand Island, New York facility.

**EXCLUDED:** All business office clerical employees, guards and professional employees and supervisors as defined by the Act, and all other employees.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

#### *B. Refusal to Bargain*

By letters dated February 3 and 21, 2017, the Union requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since February 3, 2017, the Respondent has failed and refused to do so.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By failing and refusing since February 3, 2017, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided

by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

#### ORDER

The National Labor Relations Board orders that the Respondent, 2850 Grand Island Boulevard Operating Company, LLC d/b/a Elderwood at Grand Island, Grand Island, New York, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing and refusing to recognize and bargain with 1199 SEIU United Healthcare Workers East as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

**INCLUDED:** All full-time and regular part-time and per diem service and maintenance and technical employees including LPNs, LPN Team Leaders, LPN Charge, CNAs, Activity Leaders, Cooks, Dietary Aides, Housekeeping Aides, Laundry Aides, Maintenance Assistants, Memory Care Specialists, Physical Therapy Aides, Seasons Certified Nursing Assistants, Certified Occupational Therapy Assistants, Diet Technicians, Physical Therapy Assistants, Unit Clerks, Receptionists, and Medical Records Coordinators employed by the Employer at its 2850 Grand Island Boulevard, Grand Island, New York facility.

**EXCLUDED:** All business office clerical employees, guards and professional employees and supervisors as defined by the Act, and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Grand Island, New York, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice,

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 3, 2017.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 21, 2017

\_\_\_\_\_  
Philip A. Miscimarra, Chairman

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

#### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

\_\_\_\_\_  
The National Labor Relations Board shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with 1199 SEIU United Healthcare Workers East as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

**INCLUDED:** All full-time and regular part-time and per diem service and maintenance and technical employees including LPNs, LPN Team Leaders, LPN Charge, CNAs, Activity Leaders, Cooks, Dietary Aides, Housekeeping Aides, Laundry Aides, Maintenance Assistants, Memory Care Specialists, Physical Therapy Aides, Seasons Certified Nursing Assistants, Certified Occupational Therapy Assistants, Diet Technicians, Physical Therapy Assistants, Unit Clerks, Receptionists, and Medical Records Coordinators employed by the Employer at its 2850 Grand Island Boulevard, Grand Island, New York facility.

**EXCLUDED:** All business office clerical employees, guards and professional employees and supervisors as defined by the Act, and all other employees.

2850 GRAND ISLAND BOULEVARD OPERATING  
COMPANY LLC D/B/A ELDERWOOD AT GRAND  
ISLAND

The Board's decision can be found at [www.nlr.gov/case/03-CA-193859](http://www.nlr.gov/case/03-CA-193859) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.





# **EXHIBIT B**

**UNITED STATES COURT OF APPEALS  
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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner 2850 Grand Island Boulevard Operating Company, LLC, d/b/a Elderwood at Grand Island (“Elderwood”) states that it has no parent company and no publicly held company owns 10% or more of Elderwood.

DATED: July 31, 2017

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